

Certain Pressing Legal Issues of Social Media Accounts
A Comparative Study in the Context of the Iraqi Law
and Laws of Developed Countries

بعض القضايا القانونية الملحة المتعلقة بحسابات وسائل التواصل
الاجتماعي

دراسة مقارنة في سياق القانون العراقي و قوانين الدول المتقدمة

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Abstract

The rise of social media sites has dramatically transformed humans' interaction from material shape to digital shape. This dynamic change has helped information to fly and interconnect with enormous number of profiles in a short time. Through these engaging platforms, individuals can easily share information and exchange experiences in almost every aspect of life. These platforms have no limit capabilities in reaching out people, as well as geographical locations. Thus, businesses have started to utilize these social platforms for commercial promotion. The increasingly use of these patterns of social interaction gives rise to certain legal issues. Yet, the functioning rules of these platforms are not clear. Furthermore, the relations between the users and providers, the users and the content, as well as the users and businesses need legal clarification. Therefore, it is significant that the engagement of individuals is shaped in a proper legal conditioning. This requires thorough analysis and deep-rooted legal examination of the social media policies that govern these platforms, as well as prevailing legislation, whether in Iraq or developed countries, that are pertinent to deal with such issues when arise. These issues to large extent are found capable of being solved by agreements between businesses and individuals.

Keywords: *Social Media Account, Intellectual Property Right, Copyright, Labor Contact, Terms of Service, Consumers' Rights.*

ملخص البحث

إن انتشار مواقع التواصل الاجتماعي قد حول التفاعل البشري بشكل كبير من الحيز المادي الى الحيز والشكل الرقمي. هذا التغير الكبير قد ساعد المعلومات الى الانتقال والاتصال بعدد كبير من الاشخاص من خلال بروفائلاتهم وخلال وقت قصير. من خلال هذه المنصات التفاعلية، اصبح بمقدور الافراد تبادل المعلومات والخبرات تقريبا في كل جانب من جوانب الحياة. وهذه المنصات ليست لها قدرات محدودة في الوصول الى الاشخاص وكذلك المواقع الجغرافية. لهذا بدأت المواقع التجارية باستخدام هذه المنصات الاجتماعية لغرض الترويج التجاري. وان الاستخدام المتزايد لنمط من هذه المنصات ادى الى بعض من المشاكل القانونية. وعلية، لا تزال القواعد التي تعمل بها هذه المنصات غير واضحة. اضافة الى ذلك، العلاقة بين المستخدم والمزود، والمستخدم والمحتوى وكذلك المستخدم والتجار تحتاج الى توضيح. لذلك من المهم جدا أن يتم وضع توصيف قانوني ملائم لتفاعل الافراد مع هذه المنصات. وهذا يتطلب التحليل الجذري القانوني للسياسات التي تحكم هذه المنصات. بالاضافة الى القوانين المعمولة بها سواء في العراق او الدول المتقدمة، تلك القوانين التي تتعامل مع المشاكل التي تظهر مع هذه المنصات. وهذه المشاكل بصورة عامة قابلة للحل من خلال الاتفاقات التي تبرم بين التجار والافراد.

الكلمات المفتاحية: حساب التواصل الاجتماعي، حق الملكية الفكرية، حق المؤلف، عقد العمل، شروط الخدمة، حقوق المستهلك.

پوخته

دگهل زیده بوونا پیگه هیئت په یوه نډیټ جفاکی (سوشیال میدیای) تیکه لیا مرؤفی ب شیوه یه کی مه زن هاتییه گوهورپین ژ چارچو فیه یی بهرجه سته یی بو چارچو فیه یی ژماره یی (دیجیتالی). نه ف گوهورپینه بوویه هوکار کو پیزانین بهینه فه گوهاستن وگریدان ب هژماره یه کا مه زن یا تاکه که سان ب ریکا پرؤبایلین وان و د دمه کی کورتدا. ب ریکا فان پیگه هیئت په یوه نډیټ جفاکی، د شیانیټ مرؤفان دا هه یه پیزانین وشاره زاییا لیک ب گوهورن د هومی بیافیت ژیانیدا. وشیانیټ فان پیگه ها نه د سنووردار کرینه د گهشتنی دا بو تاکه که سا وجهیت جیوگرافی، ژ بهر فی چهندي بازرگانان دهست ب کارئینانا فان پیگه ها کریه پیخه مهت باشناف کرنا بازرگانی. و ب کارئینانا زیده یا جوړه ک ژ فان پیگه هیئت جفاکی بوویه نه گهری دروست بوونا هنده ک ناریشیت یاسایی. و نه و ریسیایټ کو نه ف پیگه هه پی کار دکهن تا نوکه د روون نینن. زیده باری وی چهندي، په یوه نډی د نافه را ب کارهینهر وپیشکیشکهری خزمه تگوزاییا پیگه هیټ په یوه نډی، وهروه سا ب کاهینهر ونافه رپوکی، و ب کارهینهر وبازرگانی پیدفی ب روون کرنی هه یه. ژ بهر فی چهندي گله ک یا گرنگه دانه نیاسینه کا یاسایی یا گونجای بو ب کارئینانا تاکه که سان بو فان پیگه هان هه بیت. نه ف چهنده پیدفی ب شروفه کرنه کا یاسایی وریشه یی هه یه بو وان سیاسه تیټ فان پیگه ها ب ریقه دبهن. زیده باری یاسایټ شوله ژی چ ل عیراقی یان وه لاتیټ پیشکه فتی. وان یاسایټ سه رده ریټ دگهل ناریشیت پیگه هیئت په یوه نډیټ جفاکی ل دمی په یدا بوونی. نه ف جوړه ناریشه ب شیوه یه کی گشتی دهینه چاره سه رکرن ب ریکا وان گریبه ستیت دهینه گریدان دنافه را بازرگان و تاکه که سان دا.

په یفتیټ ده سپیکي: هژمارا په یوه نډیټ جفاکی، مافی خاوه نډاره تییا هنری، مافی چاپ کرنی، گریبه ستا کاری، مهرجیت خزمه تی، مافیت ب کار بهری.

1. Introduction

1.1. General Background:

Nowadays, social media accounts are known for their crucial influence on effective communication and interaction among individuals around the globe.⁽¹⁾ Originally, these engaging platforms were created to offer online users' space for sharing personal and social experiences. Platforms like *Facebook*, *Instagram*, and *Snapchat* have millions of subscribers who share, exchange information and experiences on daily basis. Perhaps, these platforms have rapid as well as essential impact on spreading information among individuals, affecting almost every aspect of individuals' life.⁽²⁾ With this crucial feature, business and enterprises have begun to use social media platforms as tools for commercial purposes such as business promotion, marketing, and most importantly selling their products and services.

As a result, '*Social Media Commerce*' has evolved in reference to the type of commerce that is conducted online through social media accounts. Indeed, this commercial use of social media accounts is not confined to companies, but also individuals through their personal accounts. Perhaps, these media accounts have turned into important legal object that generate income for their users and adding economic value.⁽³⁾ Provided, it is sometimes difficult to draw a line between social aspects and commercial aspects of the social media accounts.⁽⁴⁾ For instance, imagine a person recording his best moment at a pizza shop and posting it on his personal

⁽¹⁾ Rivaldi Aka Akbar, Aji Mulyana, and Mia Amalia, 'Legal Challenges in the Age of Social Media: Protecting Citizens from Misuse of Information' (2023) 3 (1) Golden Ratio of Law and Social Policy Review 16-17.

⁽²⁾ Daniele Battista , and Gabriele Uva, 'Exploring the Legal Regulation of Social Media in Europe: A Review of Dynamics and Challenges-Current Trends and Future Developments' (2023) 15 (5) Sustainability 4148.

⁽³⁾ Kateryna Nekit, 'Legal Aspects of The Use of Social Media Accounts: Current State and Perspectives' (2020) 10 (3) The lawyer Quarterly 305.

⁽⁴⁾ Hugh McLaughlin, 'You're Fired: Pack Everything but Your Social Media Passwords' (2015) 13 (1) Northwestern Journal of Technology and Intellectual Property 90.

social media account. This action might be construed as a mere personal reflection on a social aspect. It is also likely that the person was hired to promote pizza business through a personal social media account.

This rapid development gives rise to many legal problems which prevailing legislation are not well prepared to deal with. It is important at first place that rules and regulations, as known terms of service, are clear for users in the sense of granting rights and imposing duties. Besides, all actions that are carried out over these platforms should have been shaped through proper legal conditioning. These issues can be considered real challenges that may affect the function of these platforms, as well as they may leave effect on their legal conditioning.⁽¹⁾

1.2. Statement of Research Problem:

From legal perspective, it is arguably not clear the rules that govern social media accounts. This is true when the talk is on the relationships between users and providers, as well as their relationships with others. The same argument is relevant in cases where social media accounts are created by individuals but subsequently used for businesses upon bilateral consent. It is also a concern giving the account's owner the legal capability to transfer the control over the social media account to another person, whether via sale, lease or donation contract, without considering rights of the followers who might have followed the account based on certain purposes. For instance, a person may follow a football social media account and he might not feel happy to see the content of the account has suddenly changed from sports to food.

1.3. Research Questions:

This research paper poses three main questions;

First: What are the rules that govern social media accounts? are they clear enough to tackle issues related to the legal shape of relationships between parties engaged?

⁽¹⁾ Dr. Mahmood Mohammed Abo-frwa, 'Social Media Platforms and Its legal liability over Illegal Content' (2022) 10 (3) Kuwait International College of Law Journal 165.

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Second: To whom should the social media account belong in cases when the account is used for commercial purposes?

Third: do individuals have rights to sell their social media account in the first place?

1.4. Research Methodology:

This paper attempts to explore rules and conditions set up by social media companies for creating and dealing with social media accounts. It is also significant that we examine the social media case in the light of *the Iraqi Law* and laws of developed countries in Europe and USA supported by judicial rulings, where necessary.

1.5. Research Structure:

This research is structured over three sections; firstly, attempts will be made to analyze terms of service of major social media providers. Secondly, the legal nature of the relationships between concerned parties will be thoroughly discussed. Finally, the paper will place emphases on the dispute between the user and providers over the ownership of the account.

2.Terms of Service of Social Media Accounts

2.1. Social Media: General definition Broadly speaking, social media is defined as a group of applications that are built upon Internet based on the ideological and technological foundations of web. Accordingly, users are allowed to create and exchange the content.⁽¹⁾ To say it differently, social media sites are not more than web-based services that give individuals space to create a public or semi-public account within a limited shape, allowing them to form a list of other users with whom they would share a connection, including *Facebook, Instagram*, and many others. Further definition, social media is no more than “forms of electronic communication which give the

⁽¹⁾ Moses Kwame Kumah, ‘The Role of Social Media as a Platform for E-Commerce’ Vaasan Ammattikorkeakoulu, PhD Thesis submitted to University of Applied Sciences, International Business 3. Available at: < <https://www.theseus.fi/handle/10024/142134> > Last visit January 2024.

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users the space to create online communities to share information, ideas, personal messages, and other content”.⁽¹⁾

These platforms enable users to share written statuses on their own profile, videos, images, private messages.⁽²⁾ Provided, social media is considered part of social media networking. Platforms like *Facebook* and *X Twitter* are classified as social media networking that provide certain set of functions such as creating profiles, posting and sharing content, and the ability to connect with other profiles. However, social media networking is just a huge part of the social media that may encompass any technologies that enable users to make online conversations, including blogs, wikis, chat room, and may others.⁽³⁾

In literature, it is not well- established whether these social media accounts are media platform or not. In 2020, the Council of Europe reported that these platforms along with information providers are reconstituting the nature of what media are, but they do not necessarily work within standards of media accountability, independence and transparency.⁽⁴⁾

2.2. Terms of Service and Applicable Laws

Terms of service are a set of rules and instructions provided by social media providers. Accordingly, at the time these rules are accepted by users, they govern the legal shape of relations between social media users and its providers. As *Santa* clarified, terms of service turn from a set of rules laid

⁽¹⁾ Kathleen McGarvey Hidy, J.D., Mary Sheila E. McDonald, J.D, ‘Risky Business: The Legal Implications of Social Media’s Increasing Role in Employment Decisions’ (2013) 18 (1) *Journal of Legal Studies in Business* 69.

⁽²⁾ Gebicka, Aleksandra, and Andreas Heinemann, ‘Social Media & Competition Law’ (2014) 37 (2) *World Competition* 152.

⁽³⁾ Ryan Garcia, Thaddeus A. Hoffmeister ‘Social Media Law in a Nutshell’ (2017) *School of Law Faculty Publications* 3-4.

⁽⁴⁾ The Council of Europe’s background report on media freedom, regulation and trust issued on the eve of the ministerial conference on the media in Nicosia, Cyprus, cited in; Zankova, Bissera, and Valeriy Dimitrov, ‘Social Media Regulation: Models and Proposals’ (2020) 10 (2) *Journalism and Mass Communication* 76. In this regard, Dr. Mahmood argues that these platforms can function as social media channel when they are used for such purpose by media institutes, then they would be subject to laws and regulations that cover media. See, Mohammed Abo-frwa (n 5) 168.

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down by social media providers to an agreement or contract between providers and their users at the time these rules are accepted. The core of the agreement is the provision of services in a digital environment.⁽¹⁾ Two questions arise here; one is regarding the types of laws that may cover these relationships between the two parties. The other question has connection with the country law that may govern these relations, especially if we take into consideration the fact that these services are provided in a digital environment across geographical borders.

Generally speaking, any action related to social media accounts, no matter whether creating rights or imposing duties, are subject to laws that are enacted to protect consumers in the digital environment. In Iraq, for long time *the Iraqi Civil Law (40) 1951* has jurisdiction to deal with matters related to financial aspects of the individuals' private relationships. Furthermore, this law is yet the main resource on which the Iraqi courts should rely when latter private laws are lack of providing proper treatments.⁽²⁾ As consumers' aspect, *the Iraqi Consumer Protection Law No.(1) of 2010*,⁽³⁾ as well as *the Iraqi E-signature and E-Transactions Law No.(78) of 2012*⁽⁴⁾ are in force to provide a general legal jurisdiction for issues may arise from social media activities. However, these laws are yet too general and unable to delve deeply into the areas where the emphasis should have been on digital services.

⁽¹⁾ Santa Prauliņa, Copyright Issues on Social Media (2021) Master thesis presented to Riga Graduate School of Law 14. Available at: the https://dspace.lu.lv/dspace/bitstream/handle/7/56516/Praulina_Santa.pdf?sequence=1&isAllowed=y Last visit January 9, 2024.

⁽²⁾ Article 3 (1) of *the Iraqi Civil Law (40) 1951* reads; (The legislative provisions shall apply to all matters covering these provisions in letter trend and content).
of *the Iraqi Consumer Protection Law No. (1) of 2010* stipulates; (This law ⁽³⁾ Article 3 applies to all natural and legal persons who may produce, supply, sell, purchase, market, import, present services or advertise about it).
the Iraqi E-signature and E-Transactions Law (78) 2012 provides; (This law ⁽⁴⁾ Article 3 applies to: A- E- transactions which are carried out by natural or legal persons, B- Transactions on which the parties agreed to conduct over electronic means, C- Electronic financial and commercial papers).

On the contrary, developed countries have adopted another approach in elaborating consumers' issues in the digital world via specific legislation and regulations. This approach provides a better understanding for consumers' issues, as well as better solutions for such issues in that context. In the UK, *the Consumer Rights Act of 2015* recognizes digital content in Section 2 (9), making it relevant to apply in this context. In Europe countries in general, two main directives have been implemented in the EU member states since 2011.

The first one is *Directive 2011/83/Eu of The European Parliament and of the Council of 25 October 2011*. This directive is enacted based on full-harmonization that had given EU member states no choice to maintain or introduce provisions diverging from those laid down in these directives, as stated in Article (4). As a result, all EU members' states would have the same model following the implementation. The scope of this directive is defined in Article 3 (1) to apply (to any contract concluded between a trader and a consumer). It also makes clear that contracts for services, distance selling contracts, and contracts for digital services⁽¹⁾ are included with its provisions. In this way, most common actions and activities that may be conducted via social media platforms, and especially services contracts which are supplied on intangible medium under which the consumer pays or undertakes to pay price, are subject to this directive.⁽²⁾ The second directive is *Directive (Eu) 2019/2161 of the European Parliament and of the Council of 27 November 2019*. This directive has made it clear that this directive extend protection to include digital content and digital services contracts which the trader supplies or undertakes to supply a digital service to the consumer, and the consumer provides or undertakes to provide personal data.⁽³⁾

⁽¹⁾ Article 2 (11) of the Directive 2011/83/Eu stated: (digital content' means data which are produced and supplied in digital form).

⁽²⁾ See, Article 2 (6, 7, and 12) of *the Directive 2011/83/Eu*.

⁽³⁾ According to Clause 32 of *the Directive (Eu) 2019/2161*: (Consistency should be ensured between the scope of application of *Directive 2011/83/EU* and *Directive (EU)*

Pertaining to the second question, it is certainly true that any action or inaction touches on a right of consumers will make national laws relevant to apply. Some social media companies have used this approach. For instance, *Meta company (Facebook provider)* has clearly given national laws the jurisdiction in some cases, along with determining selective laws to apply in other cases. Firstly, if the contracting party is consumer, “The laws of the country in which [he] resides will apply to any claim, cause of action, or dispute [he has] against [*Meta*] that arises out of or relates to these Terms or the Meta Products”. If the contracting party is not a consumer, “and for any claim, cause of action, or dispute that *Meta* files against [him], [he] and *Meta* agree that any such claim, cause of action or dispute must be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County”.⁽¹⁾

Nevertheless, this not the case with contracts made with all social media providers. As explained earlier, terms of service are unilaterally standardized by social media providers on which consumers have no chance to negotiate or request changes, they either have to take them all or leave them all. Therefore, social media companies are used to include these terms with a clause determining the law applicable on issues arise between them and consumers. With having the contract made, it would be understood that the consumer has agreed to the law stated within the terms of service. For instance, *X Twitter* specifies the laws of the State of California for contracting parties living in the US and outside Europe and United Kingdom. For other cases, the subject is left to be determined according to the choice of law provisions.⁽²⁾ Likewise, *TikTok* defines ‘the Singapore International Arbitration Centre (“SIAC”) in accordance with the Arbitration

2019/770, which applies to contracts for the supply of digital content or digital services under which the consumer provides or undertakes to provide personal data to the trader).

⁽¹⁾ See, *Meta* Terms of Service, clause 4. (Disputes) Available at:

< https://www.facebook.com/legal/terms?_rdr> Last visit March 10, 2024.

⁽²⁾ See, *X Twitter* Terms of Service, 6. General Available at:

< https://x.com/en/tos/previous/version_15> Last visit March 15, 2024.

Rules of the Singapore International Arbitration Centre ("SIAC Rules")' as the law applicable to "Any dispute arising out of or in connection with these terms, including any question regarding existence, validity or termination of these Terms".⁽¹⁾

3. Legal Conditioning of the Social Media Account

The creation of social media accounts often requires few easy steps depending on providing personal information about the user. When required pieces of information are submitted, the account is made with a username chosen by the user and a password to use in log-in and log-out the account. Hence, two main aspects are grey areas and important to be highlighted. First, how do laws consider the relationship between the user and the account? Second, how about the relationships between users the content of such accounts? Answers to these two questions are presented as follows;

3.1. Legal Ownership Classifications over Social Media Accounts

Perhaps, the account is no more than a username and a password granted to users out of an online agreement made with providers. Technically speaking, social media account is a relationship that is created between a user and a provider through a computer, network or information service. Accordingly, a user can be identified by a username and password, which are deemed to be optional for computers and networks, but compulsory at the time of registration and subscription on which provision of the online services are mainly based.⁽²⁾

In practice, social media providers offer users two types of accounts, personal account and business account. In pursuance to the terms of service, users are allowed to exclusively use their personal accounts and they are encouraged 'and legally not allowed' to share their usernames and

⁽¹⁾ See, *Tiktok Terms of Service*, 11. Other Terms. Available at: < <https://www.tiktok.com/legal/page/row/terms-of-service/en> > Last visit March 9, 2024.

⁽²⁾ Nokit (n 3) 306.

passwords with others, considering them part of confidentiality. This exclusive control opens discussions about whether this exclusive control over the account can be considered a type of ownership. In practice, the user is legal capable to utilize the account for whatever personal purposes, make use of it for others' purposes, and transfer the control over it to another person, as will be explained later. These are the well-known three legal capabilities that any ownership can give to a person. To support this argument, Article 1048 of *the Iraqi Civil Law No. (40) of 1951* defines the right to ownership as (Perfect ownership vests onto the owner a right to dispose absolutely of that which he owns, through use, enjoyment, and exploitation he shall enjoy).

In Civil Law systems like Iraq, there are different kinds of ownerships recognized by laws. First type is corporeal ownership embodied into material things that are capable of being possessed materially by a person. Second type is incorporeal ownership that the subject thereto is incapable of being materially possessed by a person.⁽¹⁾ Thus, incorporeal property or ownership is closer to be accepted in the case of the tie between the user and the social media account.

In literature, the concept of *Virtual Property* has evolved to analyze the relationship between the user and account. This approach is presented to deny the idea of intellectual property for this relationship, as it might be considered at first glance. In this regard, *Kateryna* points out that virtual property is set up to “act more like land or mobility than ideas”. She further elaborates that virtual property should meet three characteristics: rivalrousness, persistence, interconnectivity. She concludes that “virtual property is a persistent computer code stored by a non-remote resource system, where one or more persons are empowered to control the computer code, including the removal of all other persons”.⁽²⁾ Thus, intellectual property and virtual property are both rights granted to a person over

⁽¹⁾ See, Dan E. Stigall, ‘From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code’ (2004) 65 (1) Louisiana Law Review 145-149.

⁽²⁾ Nekit (n 3) 202-204.

intangible things, and usually they are mixed with each other. However, intellectual property rights are deemed to be subject to what is called *End User License Agreements*. It can further be considered as one separate component of the virtual property beside avatars, domain names, and virtual movables.⁽¹⁾ Therefore, social media accounts consist of many legal aspects, each legal aspect is supposed to be protected by a certain law. Laws that are relevant to be applicable here are; contract related provisions, intellectual property rights laws, provisions related to property rights, as well as data protection and privacy regulations.⁽²⁾

The concept of *Virtual Property* is closer to be accepted in the Iraqi Law than the idea of the intellectual property rights. For any intellectual innovation to be protected by the intellectual property rights, it must be the outcome of an intellectual act, original as well as presented in an external tangible form.⁽³⁾ These three elements are not available in the case of the account. First, the usernames and passwords are to be made through few steps available for all people and without any innovative efforts. Second, the account is also not original by all means as it does not represent any new idea that may serve community in a way or another. Otherwise, it would lead to too many reparative ideas, then too many claims for protection. Finally, elements of the social media account, username and password, should not appear to people as part of confidentiality.

In English Law, however, courts are currently not prepared to accept the idea of property under any categories. This approach has been clear in the *Fairstar Heavy Transport N.V. v. Adkins, Justice Edwards-Stuart*, where a company closely to the idea of social media accounts, claimed that emails should not be protectable as property under English Law. Nevertheless, the court in making the ruling made a distinction between the physical medium

⁽¹⁾ Nokit (n 3) 205.

⁽²⁾ Nokit (n 3) 308.

⁽³⁾ of 1971 (as ⁽³⁾ See, Articles (2-6) of the *Iraqi Copyright Protection Law No.* amended).

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and information on it. Adding, conceptually is the main challenge before any attempts to recognize property in information.⁽¹⁾

Further ideas are discussed when the account is *Business Account* used for business purposes. First, it is arguably said that the account represented by username and password is a trade secret. It is further claimed that not only username and password are trade secret but also the list of followers on the account. This argument has been widely claimed within the US case law.⁽²⁾ This idea was first argued by Zoe Argento who claims that having access to the social media account through password is a secret matter and should be protected as a trade secret. Adding, when the account grants the holder exclusive access to the links on the account, it then adds to the account economic value. This is however can be limited to only protect access to the account, and cannot extend to any other content otherwise available to the public, he concluded.⁽³⁾

In the USA Case law, there are cases where the court ruled that social media account can be treated as trade secret. As reported, that federal district court in California refused to dismiss a trade secret brought by a claimant in *PhoneDog, 2011 U.S.* Accordingly, the court ruled that the social media password (*X Twitter*) along with followers could constitute protectable trade secrets.⁽⁴⁾ This trend of the US courts has begun following the enactment of the Uniform Trade Secrets Act (UTSA) that broadly allows business to gain

⁽¹⁾ See this case reported in; Edina Harbinja, 'Legal Nature of Emails: A Comparative Perspective' (2015) 14 (1) *Duke Law & Technology Review* 230-231.

⁽²⁾ Susan Park, Patricia Sánchez Abril, 'Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights' (2016) 53 (3) *American Business Law Journal* 15.

⁽³⁾ Zoe Argento, 'Whose Social Network Account: A Trade Secret Approach to Allocating Rights' (2013) 19 (2) *Michigan Telecommunications and Technology Law Review* 205.

⁽⁴⁾ See this case reported in; Kathleen McGarvey Hidy, 'Let Them Eat Cake: Social Media Accounts Property Rights, and the Digital Rights Revolution' (2021) 71 (1) *Depaul Law Review* 58.

entitlement to protection for commercially valuable information in cases where information is not disclosed through patent applications.⁽¹⁾

The trade secret argument, however, depends on analyzing the legal elements of secret trade. In the Iraqi Law, a secret trade is conceptualized in certain elements. First, it must be a secret piece of information that is exclusively confined to a person or a group of people. Second, it must have a trade value due to its secrecy. Finally, the owner must have spent due diligence in keeping it secret.⁽²⁾ These are elements of providing protection for undisclosed information in most developed countries.⁽³⁾ Having these elements in mind, the business account is not something that a person may obtain out of spending a level of personal efforts. Indeed, it is a result of an easy going-through process that is in reach to everyone. It is further criticized that having secrecy matter with the password alone does not give an independent economic value. Otherwise, it would be true to grant that protection to any social media user based on the fact that he has a password. Thus, this argument is widely criticized and found improper basis for any form of legal protection in this context.⁽⁴⁾

Therefore, *Kateryna* argues that even if the theory of trade secrecy in this scenario has some valid points, it would rather be true that the subject should be classified as a business asset. Meaning that, the social media passwords

⁽¹⁾ See, Jasmine McNealy, 'Who Owns Your Friends?: *Phonedog V. Kravitz* And Business Claims of Trade Secret In Social Media Information' (2013) 39 (21) Rutgers Computer & Technology Law Journal 36.

⁽²⁾ Chapter 2, Article 1 of *the Iraqi Patents and Industrial Designs Law, Undisclosed Information and Integrated Circuits and Plant Varieties No. (65) of 1970, (as in 2004). amended*

⁽³⁾ According to Section 2 of *the English Trade Secrets (Enforcement, etc.) Regulations 2018* a secret trade (means information which (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question, (b) has commercial value because it is secret, and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret). See also, *Nekit* (n 3) 306.

⁽⁴⁾ *Park* (n 28) 15.

along with other valuable business elements should be considered as one package and should be protected under business assets.⁽¹⁾ This idea can be accepted under the Iraqi Law, where any aspects that can add financial value to the overall picture of the business in the market are counted as part of the business.⁽²⁾ No matter whether these aspects are materials objects such as business location, products, or non- material objects such as business name, patent, and business address. To this end, business account is increasingly used in today's dealings as a tool to find best markets for business products, as well as find costumers and contact them.

3.2. Legal Ownership Classifications over Content of Social Media Accounts

Perhaps, what makes social media account valuable is not the account per se, but rather the content. This content may take different shapes such as posting various texts, recording various moments, sharing photos of different occasions. In most of these cases, the owner should have spent time and efforts to make it visible and subject to viewers attentions. At this point, *Zoe* claims that the content is likely to be considered original, and that much of the content is likely to qualify for copyright protection.⁽³⁾

In most legal systems in the West and East, this legal approach is likely to be accepted. In this regard, the content published on social media accounts might be subject to protection provided by Article 2 of *the Iraqi Copyright Law No. (3) of 1971 (as amended)*.⁽⁴⁾

However, this does not mean that the owner has a safe path to protect his copyright against any violation. Due to the nature of social media accounts, sometimes it is hard to claim for copyright infringement. It is possible that some posts on social media are available for a certain time of period then disappears. In other cases, the social media account might be lost and fell in

⁽¹⁾ Nekt (n 3) 307.

⁽²⁾ See, Article 33 of *the Iraqi Commerce Law No. (30) of 1984*.

⁽³⁾ Argento (n 29) 233.

⁽⁴⁾ See also, Sections (2 and 3) of *the English Copyright, Designs and Patents Act 1988*.

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the hand of a new holder. Then, the new holder may delete the content or claim that the content is his own work.⁽¹⁾ Besides, it might be hard in question for the account holder to prove that the content is a result of his personal efforts and never had been taken from another account.

4. Business Social Media Accounts: Dispute over the Ownership

The rise of social media sites along with the increasing influence they have on individuals' behaviors in the community have led companies to utilize these platforms for business promotion. This trend towards social media accounts brings outstanding benefits to the companies. First, creating such accounts do not require the company more than setting up a username and password, and likely designating a person from the company, or hiring a person from the public to lead the account and manage the content. Perhaps, this model of promotion is cost-effective if compared with other models. Secondly, social media sites have proven their crucial role in spreading information among individuals in a quick manner as well as they cover a wide geographical location in short time. Thus, user generated content through text, recording, photos and links moves from one profile to other profiles.⁽²⁾

Hence, almost all companies have social media account through which they constantly promote their business. Since the account is run by a person, no matter to what a legal bound he may be allowed to do so, the question is to whom it should belong? The person who is responsible for the account or the company. For such case, there are two scenarios that may connect the person running the social media account with the company. First, when a company

⁽¹⁾ Argento (n 29) 233.

⁽²⁾ Argento (n 29) 207-208; Thomas C. Mahlum and Andrew J. Pieper, 'From the Experts: Company vs. Employee Ownership of Social Media Assets' (2012) legal article published on An ALM Website- Corporate Council August 20, Available at: <<https://www.robinskaplan.com/-/media/pdfs/from-the-experts-company-vs-employee-ownership-of-social-media-assets.pdf>> Last visit March 10, 2024.

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directs a person to create a social media account for the company, and designates him as the person in charge of the account. Second. when a person creates his personal social media account but latter agrees with a company to use the account for the business on its behalf.

The issue arises when the company terminates the person relationships with the company, or when the person resigns from the company. The question then, to whom should the ownership of the social media account belong? The company or the person? Before offering legal analysis, it is important to shed light on terms of service in that context.

4.1. Ownership of the Social Media Account under Terms of Service

As mentioned earlier, at the time a person creates a social media account he enters a contract with the providers. Then, that contract determines the relationships between the company and the user and the users and others, including duties and rights. For instance, *Meta* terms of service (*Facebook* and *Instagram* provider) do not allow user to “buy, sell, or transfer any aspect of [his] account (including [his] username); solicit, collect, or use login credentials or badges of other users; or request or collect *Instagram* usernames, passwords, or misappropriate access tokens”. Also, the user is not allowed to share his password, give access to his *Facebook* account to others, or transfer his account to anyone else (without the *Facebook* permission).⁽¹⁾ Similarly, *X Twitter* terms of service do not give the user the right to sell his username.⁽²⁾ In addition, *LinkedIn* company obliges users not to share their usernames and passwords with any other person. It furthers obliges users to keep their passwords secret.⁽³⁾ On the other hand, *YouTube*

⁽¹⁾ *Meta* Terms of Service (n 18).

⁽²⁾ *X Twitter* Terms of Service (n 19).

⁽³⁾ See, *LinkedIn* Terms of Service. Available at:

< <https://www.linkedin.com/legal/user-agreement-summary> > Last visit March 15, 2024.

company allows people to use their service account on behalf of other business but with having a permission from the company.⁽¹⁾

All these rules determine the type of relationships between users with others. In consequence, the account is a personal ownership and specially dedicated to the person who creates the account. It is likely that after his death the account is considered part of succession and can be transferred to the successors.⁽²⁾ Under any circumstances, he is not allowed to share or transfer his personal account to another person. No matter whether this action to be carried out under sale or lease contract, or any other manner. In practice, if there is any breach to these rules the company is not liable for any damages or compensations.⁽³⁾

Then, how would we solve this issue if occurs? The following paragraphs attempt to answer;

4.2. Social Media Accounts made by a Person at Companies Request

In case if a company has requested a person, and most likely would be one of the company's employees, to create a business account for business promotion. Although, the designated person will be using his personal information in creating the account, the ownership of the account belongs to the company. Then, the relationship between the company and the person will be subject to labor law. Meaning that, anything or asset that is put under

⁽¹⁾ According to *YouTube* terms of Service; (If you are using the Service on behalf of a company or organization, you confirm to us that you have authority to act on behalf of that entity, and that entity accepts this Agreement). Available at;

< <https://www.youtube.com/static?template=terms> > Last visit May 10, 2024.

⁽²⁾ See, Elena Anatolyevna Kirillova, Albert V. Pavlyuk, Oleg Evgenyevich Blinkov, Elena Victorovna Blinkova, Elina Leonidovna Sidorenko, 'Digital Inheritance of Social Media Accounts' (2019) 8 (4) *International Journal of Engineering and Advanced Technology* 965-966; Mateusz Grochowski, 'Inheritance of the Social Media Accounts in Poland' (2019) 27 *European Review of Private Law* 1199-1201.

⁽³⁾ See, McLaughlin (n 4) 94-97.

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the control of the employee, as part of performing his obligations, should belong to the company, and therefore, it should be handed over to the company if the person terminates his relationship with the company under any reason.

This is in comply with labor contracts and labor legislation that grants the employers the power to designate employees in conducting duties. In Iraq, Article 42 of *the Iraqi Labor Law No. (37) of 2015* entitles the employer the right to organize business activities, as well as distribute tasks and liabilities among employees. The rise of social media sites has turned the media part of the business to a critical issue. In return, Article 909 (1) of *the Iraqi Civil Law* obliges the employee to (comply with the orders of the employer concerning execution of the work subject of the agreement..., [as well as] preserve the things that handed over for performing his duties). More precisely, Article 910 of *the Iraqi Civil Law* stated; (If the work assigned to the worker enables him to know the clients [social media accounts most probably allow employees to know clients of the employers] or to have access to the secret of the business, both parties may agree that the worker after the expiration of the contract [or under any early termination of the contract] may not compete or participate in a project with compete with the employer). This provision implicitly requires the employees to hand over the account upon the termination of the contract, as long as it contains list of business clients.

In addition, the content of the business account has generally connection with the business promotion. This makes the company the owner of the exclusive right of copyright.⁽¹⁾ In the US case law, there have many cases where the court ruled in favor of the company. For instance, in JLM

⁽¹⁾ Hu Ying, 'Private and Common Property Rights' (2021) 33 Singapore Academy of Law Journal 197; Louise Lundell, 'Copyright and Social Media: A Legal Analysis of Terms for Use of Photo Sharing Sites' (2015) Thesis in Commercial and Tax Law (Intellectual Property Law) presented to the University of Jönköping 5. Available at: < <https://hj.diva-portal.org/smash/record.jsf?pid=diva2%3A883305&dswid=2253> >

Last visit May 10, 2024.

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Couture, Inc. v. Gutman there was a dispute over the control and use of social media accounts between a business designer, *Gutman*, and the manufacturer who from whom she had recently resigned. The court ruled that *Gutman* who was in charge of the account had to turn over control of the account and other social media accounts to JLM. Adding, this social media account is counted important asset of the company.⁽¹⁾ In *PhoneDog v. Kravitz*, the court dismissed the allegation brought forward by an employee regarding the use of X *Twitter* following his resignation from a company, requesting him to return the password to the company based on the fact that it is considered trade secret.⁽²⁾ In *Re CTLL, LLC, No. 14-33564, 528 B.R. 359 (Bankr. S.D. Tex. 2015)*, a business company had bankrupted and the owner refused to hand over the account, claiming that he had invested his time and personality in developing the account. However, the court determined that the social media account is the property of the business and not the business owner.⁽³⁾

⁽¹⁾ See this case and other similar cases reported in; Tom Galvin, 'Who Owns the Establishing a Definitive Framework to Who Owns the Meme?: Establishing Meme?: a Definitive Framework to Resolve Disputes in Social Media Account Ownership Between Employers and Employees' (2022-2023) 14 (1) William & Mary Business Law Review 191-192; Clark, Will, 'Copyright, Ownership, And Control of User-Generated Content on Social Media Websites' (2010) 5 (2) Journal of Business & Technology Law 266-267. See this case in details reported in; Lawrence W. Gallick Aaron P. Rubin, Owned: Second Circuit Holds That Traditional Principles Of and Property Law Apply To Social Media Accounts (2024) legal article available at: < <https://www.jdsupra.com/legalnews/owned-second-circuit-holds-that-1724633/> > Last March 12, 2024.

⁽²⁾ See also, Michael Furlong, 'Putting a Price on Friendship: Examining the Battle Putting a Price on Friendship: Examining the Ownership Battle Ownership between a Business' Social Media Networks, and the Humans That Operate Them, 47 J. Marshall L. Rev. 745 (2013) That Operate Them, 47 J. Marshall L. Rev. 745 (2013) (2013) 47 (2) UIC Law Review UIC Law Review 749-751.

⁽³⁾ See this case reported in; Aylis K. Jensen, Whose Followers Are They? Establishing Ownership of Company Social Media Accounts, legal article available at; < <https://www.lawmoss.com/publication-moss-and-barnett-advocate-establishing-ownership-of-company-social-media-accounts> > Last visit June 10, 2024.

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Similar cases can be seen from the English Case Law. For instance, in *Hays Specialist Recruitment v. Ions*, [2008] EWHC 745 (Ch), the court ordered an employee to own a *LinkedIn* account after leaving a business. Giving the employer the right to own inform on the account. Similarly, in *Whitmar Publications Ltd. v. Gamage*, [2013] EWHC 1881 (Ch), the employer, *Whitmar*, successfully won an allegation against three ex-employees who used the company's *LinkedIn* group contacts to market for arival business.⁽¹⁾

4.3. Using Personal Social Media Account for Business Promotion

In this scenario, a person creates a personal social media account then agrees with a businessman to use that account for his business. In this case, it is possible that the person would have two types of content, one is reflection on his personal life and another one is related to the business promotion. In practice, such cases are common to occur especially if the person is a well-known influencer and has considerable number of followers. Hence, if the person terminates his relationship with the business, the question arises is to whom it should belong?

To begin with, the case in this situation cannot be puzzled out through terms of service, nor through provisions of the labor legislation. As explained, terms of service explicitly give the ownership of the account to the person who created it. On the other hand, provisions of the labor legislation may be relied on to tackle the issues in favor of the business exclusively in cases where the account is created upon the request of the company.

In literature, there have been many indicators on which the court may rely to settle down such cases. First, the court may look at the content of the account and make a comparison between the portion made in favor of the company and the personal portion. If the business-related content is

⁽¹⁾ See this case reported in; Stewart McKelvey, Employer or employee: who owns social media accounts or contacts? (2019) Legal article available at; [<https://stewartmckelvey.com/thought-leadership/client-update-employer-or-employee-who-owns-social-media-accounts-or-contacts/>](https://stewartmckelvey.com/thought-leadership/client-update-employer-or-employee-who-owns-social-media-accounts-or-contacts/) Last visit February 10, 2024.

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considered bigger than the account should be owned by the company and vice versa. In *re CTLI, LLC*, 528 B.R. 359, 367 74 (Bankr. S.D. Tex. 2015) the US court relied on this parameter when concluded that “Vital is the account owner because an overwhelming portion of the social media posts associated with the CEO accounts, approximately 75% (206 out of 284 posts), explicitly or implicitly promote Bang products. And an additional 15% of posts subtly market Bang products by highlighting aspects of Mr. Owoc’s persona that align closely with Vital’s marketing strategy. Only 10% of the posts were purely personal in nature. Thus, there was no genuine dispute of material fact that Vital owns the rights”.⁽¹⁾ In addition, it is useful to see whether the name of the account is the name of the employee or employer, and whether it was created by using personal or employer resources. Finally, who is considered having the access to the account through the password and who has the right to post on the account.⁽²⁾

Furthermore, written agreement between the business and the person might also be a source to overcome the dispute. In *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 5013, 2011 WL 4965172 (S.D.N.Y. Oct. 19, 2011), the US court “found that the employer indisputably owned the rights to the social media account access information pursuant to the written employment

⁽¹⁾ See this case reported in; John Gary Maynard, III & Daniel A. Schultz, “Bang” Goes the Gavel: Ownership of Social Media, Accounts Hunton Retail Law Resource Retail Law Resource Analysis and Insight in Retail Law Analysis and Insight Hunton in Retail Law (2023) legal article available at:

<<https://www.huntonak.com/hunton-retail-law-resource/bang-goes-the-gavel-ownership-of-social-media-accounts>> Last visit March 17, 2024.

⁽²⁾ Dyan Finguerra-DuCharme, Felicity Kohn and Abla Belhachmi, Social Media Ownership: When a Business Relationship Breaks Down, Who Gets the Account Accounts? (2024) 3. Legal Article available at:

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agreement”.⁽¹⁾ Therefore, the court may review the type of connection between the parties to see if there was a documented property interest in the account.⁽²⁾

5. Conclusion

This paper concludes that social media policies through terms of service have clearly designed the type of relations between the users and providers. First, creation of an account would require signing an agreement between the user and the provider through acceptance of terms of service. Through this binding agreement, the user and provider agree on the law that should be considered in cases of disputes. Then, it is likely that the law accordingly considers the user’s relation with the account as type of ownership. This might be understood from the exclusive control granted to the user over the account, as well as through the rules that obliges the user not share the account access with anyone else. Although, this digital based-ownership might not yet be recognised by Iraqi laws and comparative laws, it gives the owner the three capabilities that are provided by laws for any physical based ownership, use, exploitation, and transfer. With considering intellectual property laws in Iraq and other countries, it is found that the connection between the user and the content is likely to be determined as a matter of the intellectual property. As explained, the user often spends time and invests efforts in designing and editing post- materials on social media accounts. Therefore, the content mostly qualifies for intellectual property, although allegations might not be easy to be filed in that context, especially when a new user holds the account.

⁽¹⁾ See this case reported in; Jensen (n 50)

⁽²⁾ Deborah J. Enea, Ch. 11 Ruling Informs on Social Media Ownership Rights, Law360 on July 28, 2023, legal article available at: <https://www.troutman.com/insights/ch-11-ruling-informs-on-social-media-ownership-rights.html>> Last visit May 15, 2024.

The critical issue is found in relation to the case where a person uses his personal account for business promotion of another person. Then, a dispute arises over the ownership of the account if the account user quits the business or his relationship is terminated with the business under any reason. In pursuance to prevailing legislation, it is concluded that this case can be dealt with in two case scenarios. First, if the user is an employee and the business has designated him to create the account and use it for business promotion. Hence, it is found that pertinent Iraqi labour laws and comparative labour laws give the business the ownership right over the account. This is found obvious as long as these accounts enable users to know clients of the business. Second, if the user is not an employee but decides to use his personal account for business promotion of a person. Here, rules are not clear enough to rely on in dissolving the dispute. However, there are factors that may help the court to find solutions if taken into consideration. First factor is conducting an examination to the content of the account to see the portion posted in relation to the business compared to the personal portion. Then, whichever is bigger would be a source to give its owner the ownership. It is also found crucial looking at written agreements between users and business to see whether there is any clause that determines the ownership of the account. In addition, the name of the account whether is the name of the user or business, as well as determination of the person who has control of the account, are important for solving this dispute.

Based on that, this research study recommends the following remarks;

- The Iraqi legislature is recommended to enact a law that defines digital services to fill the gap found in this context,
- The Iraqi Legislature is recommended to enact laws and policies that regulate the relationships between users and providers. This is to avoid leaving issues completely to terms of service of providers.
- Special laws and policies are recommended to force business as well as users to imply written clauses in their agreements on determining the ownership of the account following the termination of the contract between them.

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5. *YouTube* terms of Service Available at:
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F- Iraqi Legislation

1. *The Iraqi Civil Law (40) 1951.*
2. *The Iraqi Patents and Industrial Designs Law, Undisclosed Information and Integrated Circuits and Plant Varieties No. (65) of 1970, (as amended in 2004).*
3. *The Iraqi Copyright Protection Law No. (3) of 1971.*
4. *The Iraqi Commerce Law No. (30) of 1984.*
5. *The Consumer Protection Law No. (1) of 2010.*
6. *The E-signature and E-Transactions Law No. (78) of 2012.*
7. *The Iraqi Labor Law No. (37) of 2015.*

G- English Legislation

1. *Directive 2011/83/Eu of The European Parliament and of the Council of 25 October 2011*
2. *Directive (Eu) 2019/2161 of the European Parliament and of the Council of 27 November 2019*
3. *The English Copyright, Designs and Patents Act 1988.*
4. *The English Consumer rights Act 2015.*
5. *The English Trade Secrets (Enforcement, etc.) Regulations 2018¹*